No. 18273

In The United States Court of Appeals for the Ninth Circuit

HARVEY ALUMINUM (INCORPORATED),
GENERAL ENGINEERING, INC., AND
WALLACE A. UMMEL d/b/a WALLACE
DETECTIVE AND SECURITY AGENCY,

PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON PETITION TO REVIEW NATIONAL LABOR RELATIONS BOARD ORDER

BRIEF FOR PETITIONER GENERAL ENGINEERING, INC.

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JURISDICTIONAL STATEMENT

This case appears in this court on a petition for review and a cross-petition for enforcement of an order entered October 18, 1962, and corrected November 21, 1962, by the National Labor Relations Board (R. 129). The Board's order would require that General Engineering, Inc.:

(1) reinstate two employees with back pay;

(2) cease and desist from certain conduct; and

(3) post certain notices directed to its employees (R. 132).

The Board's order would also require the other petitioners herein to cease and desist from certain practices and would require the petitioner Harvey Aluminum (Incorporated) to take certain affirmative action including the posting of notices (R. 129-132).

The Board's jurisdiction was invoked under the Labor Management Relations Act, as amended, 61 Stat. 136, 29 USC 151, *et seq.*, and the regulations promulgated thereunder (R. 11-13).

General Engineering, Inc. is an Oregon corporation whose principal place of business is in Oregon, in this circuit (R. 11-13). The unfair labor practices alleged in the Board's complaint were alleged to have occurred at The Dalles, Oregon, and Torrance, California, in this circuit (R. 11-13).

On October 20, 1962, General Engineering, Inc. and the other petitioners herein filed a joint and several petition for review of the Board's order (R. 216).

On November 30, 1962, the Board filed a cross-petition for enforcement of its order (R. 220).

This court's jurisdiction accordingly rests upon 61 Stat. 148-149, 29 USC 160(e), (f).[1]

STATEMENT OF THE CASE

General Engineering, Inc. concurs in and adopts the brief filed by the other petitioners herein. Accordingly, this brief will be devoted only to those aspects of the case which relate peculiarly to this respondent.

During the proceeding before the trial examiner, counsel for the board requested that official notice be taken of prior board

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[1] Section 10 of the Act provides in material part:

"(e) The Board shall have the power to petition any Court of Appeals of the United States * * * wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order * * *."

"(f) Any person aggrieved by a final order of the board * * * may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business * * *." 61 Stat. 148-149, 29 USC 160(e), (f).

decisions. These decisions were relied upon as showing such an inter-relationship between General Engineering, Inc. and Harvey Aluminum (Incorporated) that they should be treated as a single employer.

The first of these cases, a representation case, was decided in April of 1959 and is reported at 123 NLRB 586. The second, an unfair labor practice case, was decided in December of 1959 and is reported at 125 NLRB 674. The third case, an unfair labor practice case, was decided in May of 1961 and is reported at 131 NLRB 648. The fourth, an unfair labor practice case, was also decided in May of 1961 and is reported at 131 NLRB 901.

The record in the instant case contains no evidence as to the relationship, if any, between General Engineering and Harvey Aluminum. There is no evidence that the operations of General Engineering affect commerce within the meaning of the Act.

General Engineering, Inc. objected to the use of these decisions in exceptions to the trial examiner's intermediate report. General Engineering objected to the trial examiner's findings as to the relationship between General Engineering and Harvey Aluminum because they were not supported by substantial evidence. General Engineering objected to the trial examiner's findings that the Board had jurisdiction of General Engineering because there was no evidence that General Engineering's operations or activities, if any, could have affected commerce (R. 43).

Immediately after the decision of the trial examiner, and while the instant case was pending before the Board, General Engineering filed a motion with the board requesting an opportunity to refute the matters officially noticed. The Board denied this motion (R. 131, n. 6).

QUESTIONS PRESENTED

1. Whether the Board can take official notice of its prior decisions to establish facts which are adjudicative, disputed and critical.

2. Whether the Board having taken official notice of such facts may refuse to allow a party, upon timely request, to refute the noticed facts.

3. Whether the Board can assume jurisdiction over a corporation in a case in which there is no evidence as to the activities carried on by the corporation or that such activities, if any, could have any effect on commerce.

SPECIFICATION OF ERRORS RELIED UPON

1. The Board erred in taking official notice of prior decisions and in treating such decisions as evidence that this petitioner and Harvey Aluminum (Incorporated) constituted a single employer.

2. The Board erred in holding that this petitioner and Harvey Aluminum (Incorporated) constituted a single employer.

3. The Board erred in refusing to allow this petitioner an opportunity to refute matter officially noticed by the Board.

4. The Board erred in holding that it had jurisdiction of this petitioner and in failing to dismiss the complaint as against this petitioner.

NOTE: In the intesests of brevity this petitioner has assigned as error only those matters which relate peculiarly to it. In addition this petitioner concurs in and adopts the specification of errors relied upon by the other petitioners herein.

SUMMARY OF ARGUMENT

The Board officially noticed four of its prior decisions as establishing conclusions not based on facts appearing in the record. This petitioner made a timely request for an opportunity to refute the matter noticed. The request was denied. The Board's action violates the clear mandate of the statute requiring

that a party be given an opportunity to refute material, extra-record matter which is officially noticed. 5 USC 1006(d). The Board's decision violates due process. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302; 57 Sup. Ct. 724, 729 (1937).

General Counsel for the Board bears the burden of proving by a preponderance of the evidence that a party has violated the Act. He must bear this burden by evidence on the record. 5 USC 1006(d). Extra-record facts will not suffice. 29 USC 160(e).

Disputed, critical facts may not be officially noticed. The noticing of such facts deprives parties of the opportunity for cross-examination.

Conclusions may not be officially noticed. The evidential facts upon which the conclusions rest must be stated in order to permit the parties an apportunity to refute the noticed matter. *Ohio Bell Telephone Co. v. Public Utilities Commission, supra.* The parties are entitled to know the *evidence* with which they are confronted.

Prior Board decisions are not admissible in evidence. They are barred by the rule excluding hearsay and opinion evidence. If such decisions are to be given any effect in subsequent proceedings it must be based upon principles of res judicata.

Prior Board decisions can have no res judicata effect where the decisions are not final. None of the decisions relied upon by the Board in the instant case are final. Decisions can have no res judicata effect where the issues are different from those in the subsequent proceeding. A decision that Harvey Aluminum controls the labor relations policies of General Engineering, even assuming *arguendo* that it was correct in 1959, is not res judicata as to their relationship in 1961.

The Board has improperly relied upon official notice as establishing the identity of Harvey Aluminum and General Engineering. Upon this it has rested its jurisdiction of General Engineering. Substantial evidence on the record considered as a whole does not support the Board's decision and order as it relates to General Engineering. It is submitted that the

Board's decision and order should be reversed and the case dismissed.

I. Upon timely request parties must be afforded an opportunity to refute material facts officially noticed.

Assume for the purpose of argument that the Board may take official notice of its prior decisions as tending to establish material facts in a Board proceeding. The Board must permit the parties, on timely request, an opportunity to refute the matters noticed.

Professor Davis, in a discussion of official notice, declares:

> "The cardinal principle of a fair hearing is * * * that parties should have opportunity to meet in appropriate fashion all facts that influence the disposition of the case." 2 DAVIS, ADMINISTRATIVE LAW 432 (1958).

The failure to point out what *facts* are being noticed and to allow a party to rebut the noticed facts is a violation of due process. *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 302; 57 Sup. Ct. 724, 729 (1937).[2]

The Administrative Procedure Act contemplates that parties should have an opportunity to rebut all the material influencing the disposition of a case.[3] Section 7(d) provides parties an unrestricted right upon timely request to refute material matters officially noticed. That section provides:

> "Where any decision rests on official notice of a material fact not appearing in evidence in the record, any party

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[2] *Cf. ICC v. Louisville & Nashville R.R.,* 227 U.S. 88, 33 Sup. Ct. 185 (1913), in which the court declared:

"* * * the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." 227 U.S. at 93, 33 Sup.Ct. at 187.

[3] Section 7(c) provides:

"Every party shall have the right to * * * submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts." 60 Stat. 241, 5 USC 1006(c).

shall on timely request be afforded an opportunity to show to the contrary." 60 Stat. 241, 5 USC 1006(d).

The Board took official notice of four of its prior decisions for the purpose of showing that Harvey Aluminum (Incorporated) and General Engineering, Inc. were a single employer within the meaning of the Act.[4] Having determined in this manner that the two corporations were a single employer the Board held that since jurisdiction of Harvey Aluminum was proven it must have jurisdiction of General Engineering.

The petitioners made a timely request for an opportunity to refute the matters noticed.[5] The request was denied (R. 131, n. 6).

The noticed matter is material. Upon it rests, among other things, the Board's determination of its jurisdiction over General Engineering.

The facts noticed do not appear upon the record. Indeed, it is impossible to determine just what facts, if any, were noticed. So far as it appears in the trial examiner's intermediate report and in the Board's decision only conclusions were noticed. The facts, if any, upon which those conclusions rested are not stated (R. 131, 135). Both the trial examiner and the Board seem to be attempting, through the process of official notice to apply the otherwise inapplicable doctrine of res judicata.

The Board has officially noticed certain conclusions without stating the facts upon which it relied. This petitioner timely requested an opportunity to refute the noticed matter. Its re-

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[4] The decisions relied upon by the Board are reported at 123 NLRB 586, 125 NLRB 674, 131 NLRB No. 87 and 131 NLRB No. 108 (R. 135).

[5] The trial examiner took the disputed official notice in his intermediate report dated March 30, 1962 (R. 135). On May 18, 1962, the petitioners moved the Board, pursuant to 5 USC 1006(d) for an opportunity to refute the noticed matter. The deadline for filing exceptions to the intermediate report was May 18, 1962. Thus the request was filed before the Board could have commenced consideration of the case. Significantly, the Board did not rest its denial of the request upon its not being timely. The request must have been timely (R. 131, n. 6).

quest was refused. The statutory mandates of the Administrative Procedure Act as well as minimum standards of fairness have been ignored. This petitioner has been denied a fair hearing.

II. The Board cannot take official notice of its prior decisions to establish facts which are disputed and are critical.

A. The Board's findings in unfair labor practice cases must be based upon record evidence.

The Board's general counsel bears the burden of proving the allegations set forth in his complaint.[6] It must appear by a preponderance of the testimony taken that the respondent has committed an unfair labor practice.[7]

The general counsel must bear this burden by evidence on the record. Extra-record facts are not sufficient.[8]

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 Sup. Ct. 982 (1945), the court declared:

> "The method for prevention of unfair labor practices is for the Board to hold a hearing on a complaint which has been served upon the employer who is charged with the unfair labor practice. At that hearing the employer has the right to file an answer and give testimony. This testimony together with that given in support of the complaint, must be reduced to writing and filed with the Board. The Board upon that testimony is directed to make findings of fact

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[6] Section 7(c) of the Administrative Procedure Act provides:
"Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof * * *." 60 Stat. 241, 5 USC 1006(c).

[7] Section 10(c) of the Labor Management Relations Act provides:
"If upon the preponderance of the *testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice * * *." 61 Stat. 147, 29 USC 160(c). (Emphasis added.)

[8] Section 7(d) of the Administrative Procedure Act provides:
"The transcript of testimony and exhibits together with all papers and requests filed in the proceeding, shall constitute the *exclusive* record for decision * * *." 60 Stat. 241, 5 USC 1006(d). (Emphasis added.)
Section 10(e) of the LMRA provides:
"* * * findings with respect to questions of fact if supported by substantial *evidence on the record* considered as a whole shall be conclusive." 61 Stat. 148, 29 USC 160(e). (Emphasis added.)

and dismiss the complaint or enter appropriate orders to prevent in whole or in part the unfair labor practices which have been charged. Upon the record so made as to testimony and issues courts are empowered to enforce, modify or set aside the Board's orders * * *

"Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties. Such procedure strengthens assurance of fairness *by requiring findings on known evidence.*" 324 U.S. at 800-801; 65 Sup. Ct. at 986. (Emphasis added.)

The statutory procedure has been ignored. The Board has resorted to extra-record information in arriving at its decision. Its findings are not based on known evidence or on any evidence.

B. Facts which are adjudicative, disputed and critical may not be officially noticed.

In a discussion of official notice Professor Davis declares:

"When facts are (1) adjudicative (2) disputed and (3) critical nothing less than submission through evidence, subject to cross examination and rebuttal, will normally suffice.

* * *

The basic principle is that parties should have the opportunity to meet in the appropriate fashion all materials that influence decision. Nothing short of the opportunity for cross-examination and presentation of rebuttal evidence is appropriate for disputed facts at the center of a controversy." 2 DAVIS, ADMINISTRATIVE LAW 403-404 (1958).

This philosophy is clearly reflected in the Administrative Procedure Act. Section 7(c) requires that every party be given the right to submit rebuttal evidence and to conduct a cross-examination. 60 Stat. 241, 5 USC 1006(c). It is impossible to cross-examine or present rebuttal evidence when disputed, critical facts arising in an unfair labor practice proceeding are officially noticed.[9]

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[9] *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 33 Sup. Ct. 185 (1913), *supra*, n. 2.

The Board took official notice of its prior decisions as establishing an identity between General Engineering and Harvey Aluminum. This issue was disputed. The Board's complaint alleged that the two corporations constituted a single employer. General Engineering denied this allegation. This issue was critical. Upon its determination rests the Board's jurisdiction over General Engineering.

III. Prior Board decisions are not admissible as evidence in subsequent proceedings.

A. Where the Board utilizes official notice it must inform the parties of the evidential facts noticed.

Conclusions may not be officially noticed. Agencies must state the evidential facts upon which such conclusions are based.

In *United States v. Abilene & Southern Ry.*, 265 U.S. 274, 44 Sup. Ct. 565 (1924), the examiner announced at the hearing that he intended to refer to the annual reports filed by the carriers involved. The ICC order rested in part upon data from the annual reports though the reports were not put in evidence. The court stated that the objection to the use of such material was "that the carriers were left without notice of the evidence with which they were in fact confronted as later disclosed by the findings made." 265 U.S. at 287, 44 Sup. Ct. at 570.

The case of *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 33 Sup. Ct. 185 (1913), held that the parties must have an opportunity to know and to meet the information considered by the agency.

In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302, 57 Sup. Ct. 724, 729 (1937), the court held that the refusal to permit the company to explain or rebut extra-record statistics was a denial of due process. The court specifically pointed out that "even now we do not know the particular evidential facts of which the commission took judicial notice." *Id.* 301 U.S. at 302, 57 Sup. Ct. at 729.

In the instant case the trial examiner took official notice of four prior Board decisions as showing that Harvey Aluminum

and General Engineering were a single employer (R. 135). He did not notice any facts as supporting this conclusion. General Engineering has not been informed what facts were noticed and has been denied an opportunity to refute noticed conclusions.

B. Prior Board decisions fall within the rule excluding hearsay and opinion evidence.

Proceedings before the Board shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the federal district courts. 61 Stat. 146, 29 USC 160(b). No reason was advanced by either the trial examiner or by the Board why these rules of evidence should not have been followed in the instant case. Nevertheless they were not.

The judgments of courts determining issues of fact are not received in other suits as evidence of the facts so found. 5 WIGMORE, EVIDENCE, Sec. 1346(a) (3d ed. 1940); MCCORMICK, EVIDENCE, Sec. 295 (1954). Their use in court has been guided by principles of res judicata. The earlier findings come in, if at all, not as evidence but as a conclusive determination of issues. *Id.*

In *Universal Airlines v. Eastern Airlines,* 188 F.2d 993, 1000 (D.C. Cir. 1951) the court declared that the prior decision of an administrative agency is inadmissible because "it falls within the rule which excludes hearsay and opinion evidence."[10]

The court in *NLRB v. Bill Daniels, Inc.,* 202 F.2d 579 (6th Cir. 1953), *reversed on other grounds,* 346 U.S. 918, 74 Sup. Ct. 305 (1954), held that it was error for the Board to take official notice of its prior decisions.[11]

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[10] The court declared:

"The rights of the parties are to be determined by testimony adduced at the trial according to the rules of examination and cross-examination." 188 F.2d at 1000.

[11] On petition for rehearing the court declared:

"The Board contests this ruling upon the ground that it is entitled to take judicial notice of its own records. It is a general rule that a court will ordinarily not, either upon its own motion or upon suggestion of counsel, take judicial notice of records, judgments and orders in other proceedings, even though such case may be between the same parties and in relation to the same subject matter." 202 F.2d at 586.

In the instant case the trial examiner and the Board took official notice of prior Board decisions and treated them as evidence. In none of the noticed cases had the matter in issue in the instant case been decided. That issue was the relationship of General Engineering and Harvey Aluminum during the period the unfair labor practices alleged in the complaint in the instant case were supposed to have occurred.

C. Prior Board decisions can have no res judicata effect where the decisions are not final and where the issues differ from those in a subsequent proceeding.

Only final "judgments" have any res judicata effect. 2 DAVIS, ADMINISTRATIVE LAW, 584 (1958); RESTATEMENT, JUDGMENTS, Sec. 1 (1942).

Of the four cases officially noticed by the trial examiner none has become final. One was a representation case.[12] A Board order in a representation proceeding is not final order. *Leedom v. Kyne,* 358 U.S. 184, 187; 79 Sup. Ct. 180, 183 (1958). Another was settled.[13] The third was reversed in part and remanded for further proceedings. *General Engineering v. NLRB,* 311 F.2d 570, 574 (9th Cir. 1962).[14] The fourth was settled "without prejudice."[15] A case which is dismissed "without prejudice" cannot be taken to have established any fact and cannot be res judicata. *Hastings Mfg. Co. v. FTC,* 153 F.2d 253 (6th Cir. 1946); *cert. denied* 328 U.S. 853, 66 Sup. Ct. 1344 (1946); *Parke, Austin & Lipscomb v. FTC,* 142 F.2d 437 (2d Cir. 1944);

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[12] 123 NLRB 586

[13] 125 NLRB 674

[14] The Board's decision is reported at 131 NLRB 648 (131 NLRB No. 87)

[15] 131 NLRB 901 (131 NLRB No. 108). This court on January 31, 1962, by Judges Hamley, Morrill and Duniway in case number 17481 entered an order providing:

"* * * it is ordered that the petition for review and the cross petition for enforcement be and the same hereby are dismissed without prejudice to any party."

cert. denied 323 U.S. 753, 65 Sup. Ct. 86 (1944); 2 DAVIS, ADMINISTRATIVE LAW, 584 (1958).

Thus, none of the decisions relied upon by the trial examiner and the Board have yet become final. In every case relied upon by the trial examiner, except the representation case, official notice was taken of the earlier cases and was relied upon as establishing the relationship between General Engineering and Harvey Aluminum.[16]

In order to find that two corporations are a single employer within the meaning of the Act the Board must find that one employer controls the labor relations policies of the other. *NLRB v. Condenser Corp. of America,* 128 F.2d 67 (3d Cir. 1942). A finding that these employers occupied such a relationship at one time does not prove and does not result in collateral estoppel as to their relationship at some subsequent time. Unless the issues in two proceedings are identical the issues determined in the first proceeding can have no res judicata effect in the second. *FTC v. Raladam,* 316 U.S. 149, 150-151; 62 Sup. Ct. 966, 968 (1942).

The Board has attempted through the use of official notice and through its refusal to permit this petitioner to refute the matters noticed to give a res judicata effect to decisions which were not final in cases where the issues decided differed from those in the instant case.

This petitioner has been denied a fair hearing.

IV. The Board's findings that Harvey Aluminum and General Engineering are a single employer and that the activities of General Engineering affect commerce are not supported by substantial evidence on the record considered as a whole.

The Board's findings must be supported by "substantial evidence on the record considered as a whole." 61 Stat. 147,

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[16] The representation case is the first reported case where this issue was raised. 123 NLRB 586 (1959).

29 USC 160(c). Substantial evidence is well defined in *Universal Camera Corp. v. NLRB,* 340 U.S. 474; 71 Sup. Ct. 456 (1951), where the court declared:

> "* * * substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [citations omitted] Accordingly, it must do more than create a suspicion of the existence of the fact to be established * * *" 340 U.S. at 477; 71 Sup. Ct. at 456.

The phrase "on the record considered as a whole" means not only the evidence which supports the decision but that evidence which fairly detracts from it. *Id.* 340 U.S. at 490; 71 Sup. Ct. at 466.

For the reasons stated earlier in this brief the Board and the trial examiner improperly relied on official notice of prior decisions of the Board. There is no record evidence supporting the Board's findings and conclusions that Harvey Aluminum and General Engineering are a single employer. There is no record evidence that could form the basis for a finding that the activities of General Engineering, if any, affect commerce within the meaning of sections 2(6) and (7) of the Act. 61 Stat. 138, 29 USC 152(6) (7). The record does not support the Board's assumption of jurisdiction of General Engineering.

CONCLUSION

For the reasons stated it is respectfully submitted that the Board's order as it relates to General Engineering, Inc. should be reversed and the case dismissed.

RHOTEN, RHOTEN & SPEERSTRA

By: WILLIAM B. WYLLIE

Attorneys for Petitioner
General Engineering, Inc.

July 1963

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of this Court and that in my opinion the foregoing brief is in full compliance with those rules.

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Attorney